(3) No 03-381

Supreme Court, U.S.
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In The
Supreme Court of the United States

GREGORY A. WILLIAMS; VIRGIL HUGH REAVES,

Petitioners,

v.

RONALD HANSEN, individually and in his official capacity as Police Chief,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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10 cc

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES..... ii

ARGUMENT.....1

CONCLUSION 6

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Adarand Constructors, Inc. v. Pena,
515 U.S. 200, 132 L. Ed. 2d 158,
115 S. Ct. 2097 (1995) 4

Arlington Heights v. Metro Housing Dev Corp.,
429 U.S. 252, 50 L. Ed. 2d 450,
97 S. Ct. 554 (1977) 1

Baker v. City of St. Petersburg,
400 F.2d 294 (5th Cir. 1968) 5

Hayes v. North State Law Enforcement
Officers Ass'n,
10 F.3d 207 (4th Cir. 1993) 5

McNamara v. City of Chicago,
138 F.3d 1219 (7th Cir. 1998) 5

Patrolmen's Benevolent Ass'n of N.Y., Inc. v.
City of New York,
310 F.3d 43 (2d Cir. N.Y. 2002), cert. denied,
__ US __, 123 S. Ct. 2076 (2003) 3, 4, 5

Regents of the University of California v. Bakke,
438 U.S. 265, 57 L. Ed. 2d 750,
98 S. Ct. 2733 (1978) 4

Reynolds v. City of Chicago,
296 F.3d 524 (7th Cir. 2002) 4

Washington v. Davis,
426 U.S. 229 (1976).....2

Williams v. Fayetteville,
5:99-CV-449-BR(2) (E.D.N.C. May 13, 2002).....2

Wittmer v. Peters,
87 F.3d 916 (7th Cir. 1996) 5

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267, 90 L. Ed. 2d 260,
106 S. Ct. 1842 (1986).....4

ARGUMENT

Although admitting that race was the sole factor in determining who was subjected to this investigation, both the Fourth Circuit and the Respondent avoided a strict scrutiny analysis by reasoning that only African American police officers had been "subjected to discrimination." (Respondent's Brief, Page 1). The record more accurately outlined Mr. Hansen's motive as an attempt to uncover the names of the African American police officers that he had learned had attended a church meeting to discuss racial problems within the department. The dissent below properly acknowledged that " the dispute of fact as to Hansen's motives in selecting all and only the African-American officers in his department as targets of his investigation cannot so easily be brushed aside"[1] (App. 11, citing slip opinion). In applying the "totality of the relevant facts" inquiry, the dissent below noted that:

> In delving in the minds of state officials, a court may look to "such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metro Housing Dev Corp., 429 U.S. 252, 266 50 L. Ed. 2d 450, 97 S. Ct. 554 (1977). "[A]n invidious discriminatory purpose may

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[1]The Respondent admitted that Mr. Hansen's "motivation played no role in the analysis of the legal issue before the Court. (Respondent's Brief, pg 2).

> often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 242 426 U.S. at 242.

Also crucial to this analysis is that not one African American police officer raised any complaints about discrimination and that Mr. Hansen had prior knowledge that these officers did not want to discuss any concerns they had about discrimination with him. Furthermore, the fact that Hansen immediately disclosed to the supervisors the perceptions and comments of these African American officers with a clear invitation to "discredit" their comments as part of the ongoing investigation was highly probative of an illegal motive. And while the record remains devoid of any evidence that even one African American police officer benefited from this investigation, there is no dispute that this investigation ultimately resulted in the termination of both Petitioners solely because they perceived discrimination existed. The dissent below aptly noted:

> As the district court observed, while the purpose of the Hansen's investigation was "ostensibly to discern the existence or prevalence of discriminatory or racist practices or conduct in the Department," "[i]t seems clear from defendants' statement . . . that the Department was not intent on investigating the perceptions of discrimination but rather intent on investigating what the defendants involved considered `lies.'" Williams v. Fayetteville, Mem. Op., 5:99-CV-449-BR(2), at 22 n. 15 (E.D.N.C. May 13, 2002). The "tortuous

> machinations employed to transform descriptions of perceived discriminatory or retaliatory conduct into `lies,'" id., lend further credence to the plaintiffs' contention that Hansen ordered the African-Americans only interviews with discriminatory intent.

This decision by the Fourth Circuit conflicts with Equal Protection jurisprudence that has been consistently mandated that a strict scrutiny analysis be applied whenever a racial classification has been made by a government official. The Fourth Circuit now stands alone as the only circuit that has made such a drastic departure from this clear precedent. In Patrolmen's Benevolent Ass'n of N.Y., Inc. v. City of New York, 310 F.3d 43, 2002 (2d Cir. N.Y. 2002), cert. denied, __ US __ , 123 S. Ct. 2076 (2003), a number of African American police officers asserted that their constitutional rights were violated when they were laterally reassigned to a heavily minority precinct following an incident where a black citizen was assaulted by white officers. Just as in this case, the transfers were admittedly race-based, but the city argued they were necessary to prevent the situation from getting out of control.

In following the longstanding Equal Protection precedence established by this Court, the Second Circuit described the City of New York's effort to rationalize the racial classification as a "particularly steep uphill climb" and that:

> It is well-established that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Regents of the University of California v. Bakke, 438 U.S. 265, 291, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Justice Powell). Accordingly, all racial classifications imposed by a government actor "must be analyzed by a reviewing court under strict scrutiny." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). To survive that strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest. Id. See also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986).
>
> Patrolmen's, 310 F. 3d at 53.

Through a careful analysis, the Second Circuit then rejected the City's contentions that such a racial classification was an appropriate response to a state interest[2]. The Second Circuit noted that:

> The mere assertion of an "operational need" to make race-conscious employment decisions does not, however, give a police department carte blanche to dole out work assignments based on race if no such

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2"Argument in so sensitive an area of human relations must not.. . be allowed to draw on 'common sense,' which might be inflected by stereotypes." Reynolds v. City of Chicago, 296 F.3d 524, 526 (7th Cir. 2002)

> justification is established. The assignment of police officers to certain neighborhoods or tasks because of their race has been rightly held to run afoul of the Fourteenth Amendment. See.e.g., Baker v. City of St. Petersburg, 400 F.2d 294, 300 (5th Cir. 1968). Mindful of the potential for abuse in an "operational need" defense to race-based employment actions, courts recognizing the defense have required the government actor to demonstrate that it is "*motivated by a truly powerful and worthy concern and that the racial measure. . . adopted is a plainly apt response to that concern.*" Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996). The justification must be substantiated by objective evidence – mere speculation or conjecture is insufficient. Id at see also McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998); Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213-14 (4th Cir. 1993). (emphasis added)
>
> Patrolmen's, 310 F. 3d at Pg 52-53

The Patrolmen's case is closely analogous to this case as the New York Police Department made the exact same type of racial classification that Mr. Hansen did by distinguishing officers solely on the basis of their race. Unlike the Second Circuit, however, the Fourth Circuit chose not to follow the long standing legal precedence. The Respondent instead has attempted to distract the Court from this radical departure by misrepresenting Mr. Hansen's motivation as simply wanting to make an inquiry about racial discrimination.

However, the undisputed facts in this case were more than adequate to support an inference that Hansen's facially neutral policy of directing his investigation at the purported victims of racial discrimination within the Department was motivated by invidious discriminatory animus. The Fourth Circuit erred when it failed to apply strict scrutiny to the racial classification by the Fayetteville City Police Department and qualified immunity should not have been granted.

CONCLUSION

For the foregoing reasons, Virgil H. Reaves and Gregory A. Williams respectfully request the Court to grant their petition for certiorari.

Respectfully submitted this the 24th day of November 2003.

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